In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 556

SOUTHERN CALIFORNIA EDISON COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A), is not yet reported, and was modified by order of that court (Pet. App. B). The unreported opinion of the district court appears in the record at pages 179–185.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1969. A petition for rehearing was denied on June 12, 1969. The petition for a writ of certiorari was filed on September 3, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Agriculture, as guardian of the national forests, may require a private utility

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seeking a right of way across a national forest to assume absolute liability for the costs of suppressing electrically-caused fires, while not requiring publicly-owned companies to assume such liability.

CONSTITUTION AND STATUTES INVOLVED

Article IV, Section 3, clause 2, of the United States Constitution, reads in pertinent part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *.

The Organic Administration Act of June 4, 1897, 30 Stat. 35, as amended, 16 U.S.C. 551, provides in pertinent part:

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside * * * and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction * * *.

The Act of February 15, 1901, 31 Stat. 790, as amended, 16 U.S.C. 522, provides in pertinent part:

> The Secretary of Agriculture is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the national forests for electrical plants, poles, and lines for the generation and distribution of electrical power, * * *.

The Act of March 4, 1911, 36 Stat. 1253, as amended, 16 U.S.C. 523, provides in relevant part:

> The head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the national forests of the United States for electrical poles and lines for the transmission and distribution of electrical power * * *: *Provided,* That such right-of-way shall be allowed within or through any national forest only upon the approval of the chief officer of the department under whose supervision or control such national forest falls, and upon a finding by him that the same is not incompatible with the public interest: * * *.

STATEMENT

The United States brought this action to recover from Southern California Edison Co. (Edison) expenses the Forest Service incurred in extinguishing a forest fire in the San Bernardino National Forest. It was stipulated that the fire was electric in source, that it emanated from Edison's transmission lines within the National Forest, and that it was not the result of Edison's negligence.

The government's claim was based on the provisions of the special use permit which allowed Edison a right of way through the National Forest for operation and maintenance of an electrical transmission line. The permit is granted on the permittee's agreement to abide by the terms of a printed form, of

which condition 8 governs the permittee's liability for damage resulting from the permittee's use. As printed, condition 8 requires a permittee to use due diligence, and obliges it to pay the United States for any damage resulting from its negligence. In Edison's permit, this paragraph was stricken and a typewritten provision was inserted in its place, reading: "The permittee shall pay the United States for any damage resulting from this use." The established government practice in issuing special use permits for power transmission rights of way is to use the printed form of condition 8 in dealing with publicly-owned power companies, but to substitute the typewritten provision in dealing with privately-owned companies. Edison is privately owned.

On motion for summary judgment, the district court held for the government. It found that the substitute provision clearly and unambiguously imposed absolute liability on Edison and rejected as without merit Edison's assertion that the imposition of absolute liability is an unjustifiable discrimination against privately-owned utilities. The court of appeals affirmed, reasoning that the separate classification of privately- and publicly-owned utilities has long been held justifiable. In denying Edison's petition for rehearing and suggestion for rehearing *en banc*, the court of appeals noted that Edison had been unable to suggest any showing it could make on trial of the case, beyond the conceded, and insufficient, fact that a practice of discriminating between publicly- and privately-owned utilities exists (Pet. App. B).

ARGUMENT

The decision of the court of appeals is plainly correct and does not conflict with the controlling

decisions of this Court or the decisions of any court of appeals.[1] Accordingly, there is no occasion for further review.

1. The United States may require that power line permittees assume absolute liability for costs of suppressing electrically-caused fires as a condition of granting the permit. It is the owner of the public lands. Article IV, Section 3, of the Constitution commits the control and disposition of these lands to Congress. This Court has consistently recognized the plenary power of Congress to dispose of public lands upon such terms and conditions as the public interest requires. *United States* v. *California*, 332 U.S. 19, 27; *Ruddy* v. *Rossi*, 248 U.S. 104, 106; *Gibson* v. *Chouteau*, 13 Wall. 92, 99. This power over the government's property includes the power completely to deny others the right to use it, or to permit use only on stated terms. Thus, it can require as a condition to permitting construction of a dam upon a navigable stream that the licensee agree to sell the dam to the government at less than fair value. *United States* v. *Appalachian Power Co.*, 311 U.S. 377. A utility seeking a right of way over public lands may be required to agree to carry government power over its lines. *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17. And the grant to San Francisco of certain lands and rights of way over federal property, for use as a municipal water supply and for electrical production, could be conditioned on

[1] The "Perko cases" cited by petitioner, Pet. 10, 14, 18, deal with the unsuccessful efforts of resort owners to resist a ban on air travel in a primitive section of national forest, and raise no issues presented here.

the City's agreement not to transfer the right to sell electrical power produced under this grant to any private utility:

> The power over the public land thus entrusted to Congress is without limitations. "And it is not for the courts to say how that trust shall be administered. That is for Congress to determine." Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy. And the policy to govern disposal of rights to develop hydroelectric power in such public lands may, if Congress chooses, be one designed to avoid monopoly and to bring about a wide-spread distribution of benefits. The statutory requirement that Hetch-Hetchy power be publicly distributed does not represent an exercise of a general control over public policy in a State but instead only an exercise of the complete power which Congress has over particular property entrusted to it. [*United States* v. *San Francisco,* 310 U.S. 16, 29–30.]

The power of Congress over the public lands is delegable, *Best* v. *Humboldt Mining Co.,* 371 U.S. 334, 336–338; *United States* v. *Grimaud,* 220 U.S. 506, and the executive department to which the power is delegated, like Congress, may impose conditions on their use. *Ivanhoe Irrig. Dist.* v. *McCracken,* 357 U.S. 275, 295; *Southern Pac. Co.* v. *Olympian Co.,* 260 U.S. 205.

> The Government may dispense its bounty on such terms as it sees fit; and the executive agency which Congress has chosen for the purpose of giving away public lands and mineral deposits is peculiarly equipped, in terms of experience and administrative capacity, to act

> in its behalf. When an executive agency acts in this capacity, there is, perhaps, less reason than in any other type of administrative action to subject its determinations to judicial review. [*Ickes* v. *Underwood,* 141 F. 2d 546, 548 (C.A.D.C.), certiorari denied, 323 U.S. 713.]

With respect to the national forests, Congress has directed the Secretary of Agriculture to "make provisions for the protection against destruction by fire and depredations upon the public forests and national forests * * * to regulate their occupancy and use and to preserve the forests thereon from destruction." Organic Administration Act of June 4, 1897, 30 Stat. 35, as amended, 16 U.S.C. 551. In addition, the Secretary is "authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the national forests for electrical plants, poles, and lines for the generation and distribution of electrical power." Act of February 15, 1901, 31 Stat. 790, as amended, 16 U.S.C. 522. Statutory authority to impose absolute liability for fire suppression costs as a condition of permitting use of national forests for electrical power lines is thus plain.

The Secretary is directed to exercise discretion and judgment in adjusting policies calculated to achieve the purposes of these Acts. See *McMichael* v. *United States,* 355 F. 2d 283 (C.A. 9); *Forbes* v. *United States,* 125 F. 2d 404, 408–410 (C.A. 9). And to the Secretary's policy attaches a presumption of the existence of facts justifying the policy. *Thompson* v. *Consolidated Gas Co.,* 300 U.S. 55, 69. Regulations, such as those imposing absolute liability upon private utilities seeking to use national forests for electrical trans-

mission, cannot be invalidated unless plainly inconsistent with the law. *Boske* v. *Comingore,* 177 U.S. 459, 470. In view of the known facts about the danger of forest fires, the difficulties of proof, and the annual destruction which they effect upon forests, the Secretary's imposition of absolute liability here was justified. See *St. Louis and San Francisco R'y* v. *Mathews,* 165 U.S. 1; *Crowell* v. *Benson,* 285 U.S. 22, 41–42; *N.Y. Central R.R. Co.* v. *White,* 243 U.S. 188.

2. The separate classification of publicly-owned and privately-owned utilities does not violate due process. As the court of appeals stated, "Even under the equal protection clause the separate classification of privately and publicly owned utilities has long been held justifiable" (Pet. App. A 2–3). *St. Louis and San Francisco R'y* v. *Mathews, supra; Springfield Gas Co.* v. *Springfield,* 257 U.S. 66, 70–71; *Louisville Gas Co.* v. *Coleman,* 277 U.S. 32, 37; *Puget Sound Co.* v. *Seattle,* 291 U.S. 619.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] If required, a basis for the discrimination in this case appears from the fact that many if not all publicly-owned utilities would be unable to commit themselves to absolute liability (Pet. App. E).

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